

No. 20137

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HENRY GAMERO, also known as ENRIQUE GAMERO,

Appellant,

vs.

IMMIGRATION AND NATURALIZATION SERVICE, LOS
ANGELES DISTRICT; GEORGE K. ROSENBERG, as Dis-
trict Director,

Appellee.

APPELLANT'S REPLY BRIEF.

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Respondents' Reply Brief stresses the main point that the long absence of appellant can only give rise to but one conclusion that he intended to abandon his California residence or domicile and not to return to this country.

Of course, the length of absence is a factor to be considered in such a determination. But it is not the only factor nor the controlling factor. Conduct may be conducive of more than one reasonable conclusion.

Here we are dealing with intent. Intention being a subjective state of mind requires us to a forced determination of it by objective standards and applications predicated on the established actions and causes of conduct surrounding the subject in the pertinent period.

Things happen according to the ordinary causes of nature and the ordinary habits of life with but few

exceptions. Man's conduct is principally and primarily controlled by the conditions and factors present at the time of his decisions and conduct. We generally conclude that under same and similar circumstances, persons act in but one way for is this not the basic premise of our "reasonable man" rule of law.

Therefore, without desiring to be repetitious, we must review the conduct of appellant to be able to reasonably evaluate his subjective state of mind and thereafter conclude the reasons for his conduct, the underlying thoughts resulting in his initial desire to return to Mexico, his reasons for his original stay, for his extended stay for the period of the remaining life of his aged mother, and lastly, for the continued stay in Mexico after her death.

Who is appellant and what is his background, education and experience, especially concerning the laws of the United States—his knowledge of his rights and how to obtain and protect them?

Petitioner is a native of Mexico and originally came to the United States in 1916. He is now 58 years of age. He is self educated having had but little schooling in Mexico. His conduct has been good and he always conducted himself as a law-abiding person—hard working and steadily employed and an asset to our society. He has had no experience in the law or with the law except in the subject proceeding and like many foreign born has been handicapped by a new language, and has not only a supreme respect for law and the authorities, but a basic fear of it and its enforcement.

He remained in the United States for an initial period of 27 years trying to establish himself and to create

a standard of living and an economic status which did not and could not exist for persons of his background, qualification and education in the old country.

While a lawful resident of the United States, he married his wife who is a lawful resident of the United States and there was born of said union in 1938, a son who is a citizen of the United States.

There can be no argument concerning his intention to remain in the United States during the period from 1916 to 1943 when he returned to Mexico.

All of his family—his wife, son, two citizen brothers and a lawful resident sister, were likewise domiciled in Los Angeles. Furthermore, his aged mother, his only other then living close relative, was residing in Los Angeles for the period to 1938.

In 1938, his mother disappeared—why was not then known and still is not to this day although the belief is that she was deported. To where was then not known and was not learned until he verified it by a trip to Mexico when in 1943 his aunt residing in Mexico advised him and his family that she had seen a person who appeared to be the mother of these persons living under lamentable circumstances in an insane asylum under another name.

What was the state of mind of appellant on learning of these facts—that such a person might be his aged mother—so deplorably situated after not having been heard of for over 5 years of unexplained absence and whereabouts unknown?

What do persons who are normal in their reactions having such love and respect for parents as is present especially in Latin Americans. What is then the rea-

sonable and rational course of conduct to be followed. A meeting of the family with the first consideration—immediate action first to establish her identity and secondly to return her to her loved ones—her family in Los Angeles where she was lawfully residing?

But who could best go? Of her sons and daughters, two of whom were actively in the Armed Forces of the United States at San Diego, California, the logical decision was to select the remaining brother, appellant herein, to investigate and determine such existence of his mother and to take the necessary steps and action to return her to the United States.

Attention is first directed to appellants their military status. In 1943, he was 34 years of age, married, with a minor child of 5 years of age. The draft was not taking such persons so situated and in our opinion it would be a most far fetched conclusion that he left to evade the Draft. The better and more logical conclusion is that he left with the sole purpose of determining identity and to return with his mother as soon as possible. Certainly he did not go to improve his economic status for especially during the war years his economic position was far, far better than he could, did or ever could obtain by any employment for which he was qualified in Mexico.

What else did he do before he left for Mexico? He first obtained permission from the Selective Service Draft Board for a short absence together with a leave of absence from his employment coupled with a similar leave from the school he was then attending, and a certification by the Immigration and Naturalization Service of the United States so that he could return

within a few months to his lawful residence in the United States.

He believed and it is fair to believe that he would return within this period of time—for if this person was not his mother, there was no reason to stay and if this person was his mother he sincerely believed he could have her released to him and timely return. Did this in appellant seem a reasonable intention not capable of any other conclusion for his taking such leave for such purpose. This was not the action of a man in flight with a determination and reservation not to return. His leave was voluntary and not under any Order for Deportation or pending threat thereof.

Considering his desire for the welfare, health and happiness of his aged mother, what strong feelings of pity and resentment entered his mind when he was sure that this person living in a most deplorable and lamentable condition, barefooted, clothed in dirty overalls, imbedded with animals crawling in her hair, sleeping in unclean conditions and forced to survive on an inadequate diet was his mother.

Upon such a horrible discovery, his concern and only concern was to remove her therefrom—place her in fit habitations and surroundings, take care of her as a dutiful and loving son bound not only morally but by his great love and concern, and made immediate plans to return her to the United States. Such was his sincerity of purpose.

This he did but could only go so far for he was limited in his actions in that he was required to obtain a visa for her return which upon his request to the American Consul at Mexico City, he learned was not forthcom-

ing. She was not eligible. Consequently, he believed that there was nothing he could do there to reverse such action and this poor, uninformed, law-abiding person was frantic. As far as he was concerned, this was final in respect to the return of his mother.

So he consulted with his family, and relying upon the decision and advise of the Consul, reconciled himself to this turn of fate and did the next best thing having only in mind his concern for his mother and her immediate welfare. He could not leave her after finding her—he could not abandon her to the fate of the environment of the asylum—he could not in good conscience return alone to the United States and thereafter live with his conscience as could no other decent son.

So he stayed taking care of his mother the best he could ever renewing his efforts to return her with him to the United States, consulting with the Consul and pleading her cause, all unsuccessful—all culminating with her death in 1953 in Mexico City, never having been successful, never again being with her other children and grandchildren in the United States.

Certainly, this conduct from 1943 to her death in 1953 was not that of a man in flight—of a person desiring to change his status—nor his residence nor his domicile.

Contrariwise, these were the actions of a man desperately trying to afford his mother the love and attention of a considerate son, with the ultimate, hope, desire and intention to return her to her relatives in her old age. Did this in appellant seem unreasonable, unwarranted—were these actions and attitudes capable of

any other inferences or conclusions except but to return to the United States?

Heartbroken—disappointed and perhaps somewhat resentful, appellant proceeded with the next logical phase in his action. All reasons for his remaining in Mexico having likewise died with the death of his mother, all reasons for his being now situated again in the United States, he made plans to return.

With his limited knowledge of law and authority, he realized he would need some papers to be able to return so he went to the American Consul in Mexico City. That such matters are handled by this authority is common knowledge especially to the peasantry trying to migrate to a foreign land.

After failing in his efforts to return his mother, he now was apprised by the Consul that the price he was to pay for his love and affection and continued loyalty to her was his loss of eligibility to secure his own return. Limited in the use of the English language as well as in his knowledge of the American law he rightfully relied upon this determination of his status for what other action could he take for in his limited reasoning and knowledge the Consul's decision was final.

Nevertheless he had a duty to his family—his wife and child in addition to the great love and affection he continued to have for them. They were entitled to stay in the United States and he wanted not only the benefits of the American democracy for himself but more important, for his wife and citizen child.

Subsequently he applied for entry at San Ysidro and was refused and thereafter was paroled to the United

States Immigration and Naturalization Service on or about June of 1961, where he has been physically present in Los Angeles, California, with his wife and son.

Truly the absence is long in years but not in the life and affairs of a man confronted with these circumstances. Nevertheless these unusual and trying circumstances must overcome any other inference, presumption or conclusion. Temporary is at best a nebulous word. It is at best a word of indefiniteness and must be viewed in the light of the existing facts and circumstances then prevailing.

Presumptions even in the law vary in the particular field. In our legal considerations we increase or decrease the years before we create one, and we generally only create one by lapse of time when no other evidence or logical explanation is forthcoming. But except in very few situations, is it not to be overcome by the true facts which override its arbitrary creation?

In all cases cited by respondent, in all the decisions examined, the controlling factor is the circumstances of each subject case.

What conclusion as a reasonable man can be drawn in the subject matter in the light of the true circumstances of the subjective intention of the particular person in whose actions we are concerned?

We do not believe the law desires nor intends to create an artificial conclusion of a state of mind in utter disregard of the circumstances then actually existing which gave rise to his decisions and actions. That is, we say that regardless of this evidence—these facts, these actions—this conduct, too much time having

passed, we conclude arbitrarily that your state of mind was otherwise and that therefore objectively as reasonable men we must conclude that in our mindreading of your subjective intention you thereby intended to abandon your American family residence and domicile.

We are led to the privilege of indulging ourselves in an example which we have never forgotten presented to us by the late professor, William Herbert Page of the University of Wisconsin Law School and a recognized authority on Contracts, Wills, Constitutional Law and many other subjects.

Speaking of comparisons, inferences, conclusions and our arbitrary use of words and their meanings as well as positions taken by us, he illustrated:

A pile of sand was situated at place A. A colony of ants going back and forth to and from it from place B, removed the grains one at a time. He queried: When does place A cease to be a pile and place B become a pile of sand?

Can it therefore be rationalized that either two years or seven years or any other definite period of time does and should permit us to give rise to an arbitrary conclusion, inference or presumption while the adding of a day, week, perhaps a month or more to such a period will arbitrarily permit us to presume another factual inference, conclusion or presumption, despite the fact that an actual examination of the true facts could enable us to arrive at the opposite result?

Can we so conclude that white becomes black solely upon the elapse of such a period of time as we arbitrarily determine is sufficient. This should never be and that absence of a statute making it so we must

conclusively presume that no consideration will then be given to the true facts but that white has become black with a total disregard of what we actually see and know? What reasonable explanation can there be for his continued stay in Mexico after the death of his mother other than that stated by him. It certainly was not economic—it certainly was not the fear of persecution or prosecution; it certainly was not the presence of family problems nor his lack of employment. Nor were there any new or revived ties that held him?

Man is inherently selfish. He desires many times at almost any cost to protect and preserve that which is most dear to him.

Did this act and conduct of appellant remaining then in practically a strange land show consistency with what had gone before him in his life?

Therefore following the pattern of man it is most reasonable and logical to conclude that he could not do that which he desired to do most and above all—to return to all he loved—because of one obstacle—permission could not be obtained for his entry to the United States from the United States Consul. Denial here was final. Further recourse could only be had by repeated requests to this sole authority in a foreign land who had the sole power of saying yes or no.

This was his only avenue of re-entry—there were no other roads nor detours and right or wrong these decisions were final and appellant had no other course but to rely and believe as he did.

In conclusion can we justify separating this aging man from his wife and child as well as the other members of his immediate family and force him to now

return to that country which he freely left in 1916 almost over 50 years ago, to live a lonely life unable to be with them and undoubtedly returning to an economic status and existence far inferior to that which he here has struggled to create even if he is able to obtain such employment at his age.

The forced removal of appellant at his age from the United States to return to a land he has long abandoned leaving behind his family and only remaining close relatives is tantamount to excommunication or life imprisonment. The resulting effect on appellant and the corresponding effect on his family would be shocking, detrimental and continuous. It is indeed a cruel and lasting punishment.

Therefore before this drastic severance is enforced we believe that appellant should be afforded every legal opportunity to explain his conduct by the testimony of himself and others; to have his day in Court so that to this extent American justice will have been done.

Conclusion.

Under the circumstances and as expressed in our Opening Brief, the relief requested should be granted.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN F. SHEFFIELD

